IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

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NO. 79-721

* * *

BILLY JOE WOODS,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

* * *

On Petition For Writ Of Certiorari
To The Court Of Criminal Appeals
Of The State Of Texas

* * *

RESPONDENT'S BRIEF IN OPPOSITION

* * *

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

NOW COMES the State of Texas, Respondent herein, by and through its Attorney General, Mark White, and files this its Brief in Opposition.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals is reported as *Woods v. State*, 569 S.W.2d 901 (Tex.Crim.App. 1978).

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Honorable Court under the provision of 28 U.S.C. §1257(3). Respondent submits, however, that the questions presented herein by Petitioner were not properly raised, preseryed and decided in the Texas Court of Criminal Appeals, as required by 28 U.S.C. §1257 and Rule 23(1)(f), Rules of the United States Supreme Court, which are jurisdictional.

QUESTIONS PRESENTED

I. Whether the Petition for Writ of Certiorari was timely filed.

II. Whether the Petition for Writ of Certiorari raises issues which were not properly presented to and decided by the court below.

III. Whether the Trial Court reversibly erred in admitting photographs of the deceased.

IV. Whether the Trial Court reversibly erred in permitting the prosecutor to advise prospective jurors that the State cannot call the defendant as a witness.

V. Whether the Trial Court reversibly erred in permitting the prosecutor to inform prospective jurors of the effect of their answers to the Special Issues submitted pursuant to Art. 37.071, V.A.C.C.P.

VI. Whether the Trial Court reversibly erred in not sustaining Petitioner's challenge for cause to three prospective jurors.

VII. Whether the Trial Court reversibly erred in allowing a State psychiatrist to examine Petitioner in the absence of legal counsel.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S.CONST. amend. V.
2. U.S.CONST. amend. VI.
3. U.S.CONST. amend. XIV.
4. TEX. CODE CRIM. PROC. ANN. art. 37.071.

STATEMENT OF THE CASE

Petitioner was convicted of capital murder under Texas Penal Code, §19.03. Pursuant to Art. 37.071 of the Texas Code of Criminal Procedure, his punishment was assessed at death.

The indictment alleged that Petitioner, on or about October 10, 1975, intentionally caused the death of Mable E. Ehatt, by striking her with his hands and fists and by kicking her with his feet, and in some manner and some means, instruments, and weapons unknown to the Grand Jury, while in the course of committing the offense of burglary. A second count in the indictment alleged that Petitioner caused the death of the deceased while in the course of committing the offense of aggravated robbery.

The evidence presented at trial showed that during the early morning hours of October 10, 1975, Petitioner climbed up to the balcony of the second story apartment occupied by Mable E. Ehatt, a 62 year-old invalid woman who was afflicted with cancer and could move about only with the aid of a walker. Petitioner gained entry to the apartment by forcing open the back door and fatally beat and strangled the deceased. At Petitioner's trial the medical examiner testified that the victim suffered a fractured skull, fractured hyoid bone, blunt trauma to the neck and head and manual strangulation.

Police officers responding to a "burglary in progress" call arrived at the apartment of the deceased and apprehended Petitioner on the balcony. Petitioner's trousers, shorts, shirt and shoes were stained with blood and feces. Several items of personal property belonging to the deceased were found in the possession of Petitioner. The deceased was found to be nude below the waist. Several gray hairs, later identified as being from the head of the deceased, were removed from the zipper of Petitioner's trousers. When Petitioner was arrested at the scene of the murder the zipper to his trousers was open.

Petitioner was indicted by the Harris County Grand Jury on October 21, 1975. On July 13, 1976, in the 177th Judicial District Court of Harris County, Texas, Petitioner was convicted by a jury of capital murder, as alleged in the indictment, and on the same date the jury returned unanimous affirmative findings to the two special issues submitted pursuant to Art. 37.071 of the Texas Code of Criminal Procedure. Petitioner's punishment was assessed by the trial court at death.

Petitioner's conviction was affirmed by the Texas Court of Criminal Appeals on July 19, 1978. Petitioner's Motion for Leave to File Motion for Rehearing was denied on September 20, 1978. Petitioner's Motion to Stay Execution of Mandate for thirty (30) days was granted on October 5, 1978. The stay of execution of the mandate of the Texas Court of Criminal Appeals was continued by Order of this Court on December 1, 1978, pending the timely filing of a Petition for Writ of Certiorari. On December 21, 1978, Petitioner's time within which to file his Petition for Writ of Certiorari was extended by this Court until January 21, 1979. Petitioner's writ application was not filed until October 10, 1979.

REASONS FOR DENYING THE WRIT

I.

THE PETITION FOR WRIT OF CERTIORARI IS UNTIMELY.

The petition is clearly untimely. Rule 22(1), Rules of the Supreme Court, provides that "[a] petition for writ of certiorari to review the judgment of a state court of last resort in a criminal case shall be deemed in time when it is filed with the clerk within ninety days after the entry of such judgment. A Justice of this Court, for good cause shown, may extend the time for applying for a writ of certiorari in such cases for a period not exceeding sixty days." Petitioner's Motion for Rehearing was denied by the Court of Criminal Appeals on September 20, 1978. Thus, his petition was due on or before December 20, 1978. He was granted an extension of time until January 21, 1979. His petition was not filed until October 10, 1979, more than a year after entry of the judgment for which he seeks review and nine months after the expiration of the extension of time granted by this Court. Petitioner has never requested an additional extension of time or offered any explanation for his failure to file the petition in a timely fashion.

II.

THE PETITION FOR WRIT OF CERTIORARI RAISES ISSUES NOT PROPERLY PRESENTED TO OR DECIDED BY THE COURT BELOW.

All of the questions presented herein by Petitioner were submitted to the Texas Court of Criminal Appeals as "Points of Consideration" without citation of authorities or argument, and were summarily rejected as not being in compliance with Article 40.09, §9, V.A.C.C.P., and therefore presented nothing for review.

Woods v. State, supra at 905. This Court has repeatedly held that it will not entertain federal questions not raised, preserved and decided in the state courts below. *See, e.g., Tacon v. Arizona*, 410 U.S. 351 (1973); *Cardinale v. Louisiana*, 394 U.S. 437 (1969); and cases therein cited. To properly invoke the jurisdiction of this Court, it is crucial that the federal question not only be raised in the state proceedings, but that it be raised at the proper point and in a proper manner. *Beck v. Washington*, 369 U.S. 541, 550 (1962); *Godchaux Co., Inc. v. Estopinal*, 251 U.S. 179, 181 (1919). Respondent therefore submits that the Petition for Writ of Certiorari should be denied for want of jurisdiction.

III.

THE TRIAL COURT PROPERLY ADMITTED PHOTOGRAPHS OF THE DECEASED.

As Petitioner observes in his brief, the rule in Texas concerning the admissibility of gruesome photographs is set forth in *Martin v. State*, 475 S.W.2d 265 (Tex.Crim.App. 1972). The rule announced in *Martin*, which has been adhered to by the state courts of Texas, provides that a photograph, which is otherwise competent, material and relevant to the issue on trial, is not rendered inadmissible merely because it is gruesome, or might tend to arouse the passions of the jury; and if a verbal description of the body of the deceased and the scene of the murder is admissible, properly authenticated photographs depicting the same would likewise be admissible. *Id.* at 267; *Burns v. Beto*, 371 F.2d 598 (5th Cir. 1966).

Furthermore, the admissibility of photographs is an evidentiary question of state law; therefore, the same does not present a question of federal constitutional dimension. *Mercado v. Massey*, 536 F.2d 107 (5th Cir. 1976). Moreover, Petitioner did not properly raise this

issue on direct appeal.

IV.

THE TRIAL COURT DID NOT ERR IN PERMITTING THE PROSECUTOR TO ADVISE VENIREMEN THAT THE STATE COULD NOT CALL THE DEFENDANT AS A WITNESS.

Petitioner alleges that statements made by the prosecutor to prospective jurors that the state could not call the defendant as a witness was tantamount to an improper comment on the failure of Petitioner to testify, in violation of the privilege against self-incrimination. It is significant that the complained of statements by the prosecutor were not made during final argument, but were made during *voir dire* at a time when the prosecutor had no way of knowing whether Petitioner would testify. No motion in limine was filed, and there is nothing in the record to indicate that Petitioner's counsel informed the prosecutor or the court in advance of trial that Petitioner was not going to testify.

The statements of the prosecutor on *voir dire* were not of such a character that the prospective jurors would naturally and necessarily take to be a comment on the subsequent failure of Petitioner to testify. *United States v. White*, 444 F.2d 1274 (5th Cir. 1971), *cert. denied*, 404 U.S. 949 (1971); *Hill v. State*, 480 S.W.2d 670 (Tex.Crim.App. 1972). Furthermore, the record reflects that Petitioner did not contemporaneously object to such remarks by the prosecutor, nor did he properly raise this issue on direct appeal.

V.

THE TRIAL COURT DID NOT ERR IN PERMITTING THE PROSECUTOR TO INFORM VENIREMEN OF THE EFFECT

OF THEIR ANSWERS TO SPECIAL ISSUES.

Petitioner cites no competent authority for his proposition that it was error for the trial court to permit the prosecutor to advise the prospective jurors of the effect of the answers to the special issues submitted pursuant to Art. 37.071, V.A.C.C.P. Such procedure has been held by the Texas Court of Criminal Appeals to be within the sound discretion of the trial court. *Hammett v. State*, 578 S.W.2d 699 (Tex.Crim.App. 1979). This being a state procedural matter, no federal constitutional question is presented. Moreover, this issue was not properly raised on direct appeal and nothing is presented for review.

VI.

THE TRIAL COURT DID NOT ERR IN FAILING TO SUSTAIN PETITIONER'S CHALLENGE FOR CAUSE TO THREE PROSPECTIVE JURORS.

The record reflects that the excluded veniremen complained of by Petitioner were rehabilitated by the prosecutor and stated under oath that they could follow the law, would hold the state to its burden of proof, and could consider the full range of punishment. Furthermore, Petitioner has not alleged that he exhausted his peremptory challenges or that he was forced to accept an objectionable juror. No error is shown. Moreover, Petitioner did not properly raise this issue on direct appeal.

VII.

THE TRIAL COURT DID NOT ERR IN ALLOWING A PRE-TRIAL PSYCHIATRIC EXAMINATION OF PETITIONER TO BE CONDUCTED IN THE ABSENCE OF LEGAL COUNSEL.

The record reflects that Petitioner requested the trial court to appoint a psychiatrist to examine him prior to trial, and such request was granted by the Court. The record further reflects that Petitioner was advised by Dr. Garcia that he could decline to answer questions during the psychiatric examination.

Petitioner cites no competent authority for his proposition that he was entitled to have his attorney present during the psychiatric examination. Respondent submits that Petitioner has no constitutional right to have an attorney present during the psychiatric examination. *Smith v. Estelle*, 602 F.2d 694 (5th Cir. 1979); *United States v. Cohen*, 530 F.2d 43 (5th Cir. 1976); *United States v. Bohle*, 445 F.2d 54 (7th Cir. 1971); *United States v. Baird*, 414 F.2d 700 (2nd Cir. 1969), *cert. denied*, 396 U.S. 1005 (1970); *United States v. Albright*, 388 F.2d 719 (4th Cir. 1968).

Respondent further submits that Petitioner failed to contemporaneously object to the testimony of Dr. Garcia on the grounds now urged, and Petitioner did not properly raise this issue on direct appeal.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully prays that the Petition for Writ of Certiorari be in all things denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gerald C. Carruth, Assistant Attorney General of the State of Texas, and a member of the Bar of the Supreme Court of the United States, now enter my appearance in this cause on behalf of the Respondent, and do hereby certify that three (3) true and correct copies of the foregoing Respondent's Brief in Opposition have been served by placing same in the United States mail, first class, postage prepaid, certified, return receipt requested, on this the 19th day of December, 1979, addressed as follows:

Mr. J. Michael Thornell
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609 Fannin, Suite 517
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GERALD C. CARRUTH
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